U. S. DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION
WASHINGTON, D.C.

FRA - LOCOMOTIVE ENGINEER CERTIFICATION CASE
R. C. Beall, Hearing Petitioner, Docket No. FRA 2007-28725
(FRA Docket No. EQAL-06-64)

Herzog Transit Services, Inc., Co-Respondent

CO-RESPONDENT HERZOG TRANSIT SERVICES, INC.'S MOTION TO DISMISS FOR MOOTNESS

Pursuant to the Administrative Hearing Officer's ("Hearing Officer") Order Setting Briefing Schedule Concerning Whether This Case is Moot (Order No. 3) and 49 C.F.R. § 240.409(l), Co-Respondent Herzog Transit Services, Inc. ("Herzog") hereby submits its Motion to Dismiss for Mootness. As further discussed below, the Hearing Officer lacks the authority to grant or impose the relief requested by Hearing Petitioner R. C. Beall ("Hearing Petitioner") and, even if it were available, the imposition of such requested relief would still not affect the rights or obligations of the parties. Consequently, dismissal of this proceeding is proper.

INTRODUCTION AND BACKGROUND

On September 2, 2006, Hearing Petitioner R. C. Beall ("Hearing Petitioner") was operating as an engineer of train P66002 when he permitted that train to pass a signal displaying a red "stop" sign indication at the "IRIS" Interlocking while heading southbound to the Miami Airport Station on Track No. 1.

At the time of this incident, Hearing Petitioner was employed as an engineer by Herzog. *See* Affidavit of Peter D. Kane, ¶ 2, attached hereto as Exhibit 1. In response to

the incident, and as required by 49 C.F.R. Part 240, Herzog immediately suspended and held Hearing Petitioner's certificate pending further investigation. *Id.*, ¶ 3. On September 27, 2006, a hearing was conducted pursuant to 49 C.F.R. § 240.307, and by letter dated September 28, 2006, Hearing Petitioner was informed that he was found responsible for violating certain CSXT operating rules.[1] *Id.*, ¶ 4. As a result, Hearing Petitioner's certification was revoked for thirty (30) days. *Id.*, ¶ 5. However, that thirty (30) day revocation retroactively included the days Hearing Petitioner had already been held out of service during the investigation and hearing. *Id.* Consequently, the revocation period ended on October 3, 2006, approximately thirty (30) days from the date of the incident itself. *Id.* Hearing Petitioner's certificate was then restored and he resumed normal duty with Herzog shortly after the end of the revocation period. *Id.*, ¶ 6.

During his employment with Herzog throughout the relevant time period, Hearing Petitioner operated on the West Palm Beach-Miami Tri-Rail commuter line ("Tri-Rail commuter line") pursuant to Herzog's contract with the South Florida Regional Transportation Authority ("SFRTA"). *Id.*, ¶ 7. Herzog had operated under contract with SFRTA since 1993, but Herzog did not seek to renew its contract when it was due to expire on July 1, 2007. *Id.* SFRTA selected Veolia Transportation ("Veolia"), an independent third party operator, to replace Herzog as of that date. *Id.*, ¶ 8. The selection of Veolia was the culmination of a Request for Proposal process, which included the requirement that Veolia afford any relevant Herzog employees providing operations to SFRTA a priority in hiring at Veolia, subject to Veolia's independent hiring process. *Id.*

Veolia commenced operations on the Tri-Rail commuter line on July 1, 2007. *Id.*, ¶ 9. Hearing Petitioner is one of the legacy Herzog employees hired by Veolia.

[1] Hearing Petitioner's conduct was likewise found to have violated 49 C.F.R. § 240.117(e)(1).

Consequently, his last date of employment with Herzog was June 30, 2007.[2] *Id.*, ¶ 10. Based on knowledge and belief, Hearing Petitioner remains employed by Veolia, and has not worked for Herzog in any capacity since June 30, 2007. *Id.*, ¶ 11. Since that date, Herzog has not had active operations on the line, and Herzog and Veolia also remain independent entities.[3] *Id.*

ARGUMENT

Herzog reaffirms its previously filed responses to and denials of Hearing Petitioner's claims in this proceeding, and reiterates that Hearing Petitioner has no factual or legal basis for his claims or requested relief. However, even assuming *arguendo* for the purposes of this motion that Petitioner's claims merited some form of relief, any relief may still only be granted as provided for by the Hearing Officer's authorizing regulation in 49 C.F.R. § 240.409. A review of that regulation against the factual background of this proceeding demonstrates that the Hearing Officer lacks the authority to grant such purported relief, and that in any event such relief would not affect the current rights of the parties. Consequently, this proceeding must be dismissed as moot.

I. This Proceeding Is Moot Because Hearing Petitioner Cannot Obtain Relief

As with Federal court decisions, administrative determinations are limited to ongoing cases and controversies. *See, e.g., Appeals of Chicago & North Western Railway Co. and Federal Railroad Administration*, Administrator's Final Decision,

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[2] By letter dated October 6, 2006, the United Transportation Union, on behalf of Hearing Petitioner, petitioned the Federal Railroad Administration ("FRA") pursuant to 49 C.F.R. § 240.401 for a review of Herzog's decision. The Locomotive Engineer Review Board upheld the revocation by decision dated June 18, 2007. Hearing Petitioner requested the institution of the present administrative hearing proceeding by submission dated June 27, 2007. All these procedural events occurred prior to his voluntary departure from Herzog as of June 30, 2007.

[3] Veolia is part of a French-based multinational company, and is unrelated to Herzog or any of Herzog's corporate family.

Docket No. EQAL 92-51 (October 3, 1996) (*citing Deakins v. Monaghan*, 484 U.S. 193 (1988)). A justiciable or "live" controversy is "distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot." *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937). A case becomes moot when such a "live" case or controversy no longer exists between parties. *See Deakins v. Monaghan*, 484 U.S at 199. As a consequence, mootness can arise at any point in a proceeding. *Calderon v. Moore,* 518 U.S. 149, 150 (1996).

The case and controversy requirement is not satisfied when a petitioner fails to have "a sufficiently concrete and redressable interest in the dispute." *Fieger v. Michigan Supreme Court*, 553 F.3d 955, 961 (6th Cir. 2009) (emphasis added); *see also Diaz v. Kinkela*, 253 F.3d 241, 243 (6th Cir. 2001) (person seeking relief must have suffered, or be threatened with, an actual injury that is likely to be redressed by a favorable decision); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (one element of the irreducible standing requirement is that it be likely, rather than merely speculative, that the injury will be "redressed by a favorable decision"). Consequently, if an event occurs that makes it impossible for a court to grant effectual relief to a prevailing party, the court must dismiss the case as moot, rather than issue an advisory opinion. *Calderon v. Moore,* 518 U.S. 149, 150 (1996); *see also Mills v. Green*, 159 U.S. 651, 653 (1895) (when it becomes impossible for court, should it decide case in favor of plaintiff, to grant him effectual relief, the court will not proceed to formal judgment); *Independence Party of Richmond County v. Graham*, 413 F.3d 252, 255-56 (2nd Cir. 2005); *In Re C. L. Daniels*,

No. FRA-2001-9837-24, 2003 WL 23098416 (November 18, 2003) (Order No. 2) ("*C. L. Daniels*"),[4] at *3 (hearing officer cannot issue advisory opinions).

In this proceeding, there is no "live" case or controversy because Hearing Petitioner's interest or injury, if any, is not redressable. This is because as a threshold matter the Hearing Officer lacks the authority to grant Hearing Petitioner's requested relief. Moreover, as further discussed below even if the Hearing Officer ordered such relief despite the absence of regulatory authority, the alleged relief would not affect the current rights of the parties due to Hearing Petitioner's subsequent and voluntary departure from Herzog.

A. The Hearing Officer's Authority Is Narrow and Does Not Allow the Relief Sought By Hearing Petitioner

The Hearing Officer's authority in this proceeding is narrowly circumscribed under 49 C.F.R. § 240.409. Under that section, the petitioning party bears the burden of proving "that the railroad's decision to deny certification, deny recertification, or revoke certification was incorrect." 49 C.F.R. § 240.409(q) (emphasis added). However, the "regulations are silent ... as to any powers possessed by the presiding officer to remedy an incorrect railroad determination." *Carpenter v. Mineta*, 432 F.3d 1029, 1033 (9th Cir. 2005). This silence does not provide the presiding officer with the unrestricted power to issue remedial orders curing railroad decisions. *Id.* Rather, it is a "basic principle of administrative law that agencies must act within their regulations, have no powers not expressly granted, and may not exceed their statutory power to issue sanctions or orders."

[4] Although decisions from administrative hearing officers in proceedings held pursuant to 49 C.F.R. § 240.409 ("Section 409 proceedings") are not precedential, the Department of Transportation's Office of Hearings has indicated that in order to develop jurisprudence and provide predictability, earlier decisions would be followed unless some "intervening cause or new argument not heretofore considered" warrants a change. *C. L. Daniels,* at *2. Such is not the case here.

Id. (emphasis added); *see also C. L. Daniels*, at *3 ("[i]t has been consistently held that under the controlling regulations, a presiding officer can grant only the relief which Part 240 specifically authorizes" and the officer "only has the quantum of authority which is specifically conferred by the applicable administrative regulation.")(emphasis added).

This concept has been further emphasized in numerous Section 409 proceedings. For example, in one Section 409 proceeding, the presiding officer concluded that "a strict interpretation of the powers granted to a presiding officer in a Section 409 proceeding is in keeping with past interpretations of Section 409 in other cases." *In Re K. L. Hensley*, No. FRA-2004-18065 (Aug. 23, 2007), at 5. In another Section 409 proceeding, when discussing the scope of the presiding officer's authority, the presiding officer stated that "'I have only those limited powers which have been enumerated and specifically entrusted to me by Part 240 . . .'" *In Re S. J. Kimball,* No. FRA-2004-19997 (July 9, 2007), at 3-4 (citations omitted). Consequently, any relief granted by the Hearing Officer in this case must be specifically provided for in the relevant regulations, and may consist only of a decision issued in accordance with 49 C.F.R. §§ 240.409(t) & (u).

Hearing Petitioner nonetheless requests that "revocation of Petitioner's certification be reversed" and that "all of Petitioner's rights and benefits be restored."[5] No provision for any of these remedies exists in Section 409. Hearing Petitioner previously and voluntarily acknowledged this fundamental and dispositive flaw in the proceeding. *See Claims of Petitioner* (filed January 7, 2009) ("Hearing Petitioner's

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[5] *Hearing Petitioner's Claims,* at 2. Alternately, Hearing Petitioner requests that his "petition simply be granted." *Id.* Hearing Petitioner is presumably referring to his earlier petition to the LERB under 49 C.F.R. § 240.403. This request must also be rejected, as the petition to the LERB is not before the Hearing Officer, and the Hearing Officer lacks the authority to order the LERB to vacate or reopen its June 18, 2007 decision denying that petition. *C. L. Daniels*, at *3 (noting that nothing prior to the hearing proceeding, other than the correctness or not of the certification denial, is before the hearing officer, and denying petitioner's motion to remand to the LERB as no provision for that remedy is found in Section 409.)

Claims"), at 2 (Hearing Petitioner is "mindful of FRA's position that it has no authority to order the carrier to impose the requested relief"). However, Hearing Petitioner's proposed response – that the FRA re-visit its position under the theory that the "certification law did not restrict the additional powers of the FRA under the [Federal Railroad Safety Act]" – is another dead end. The FRA did not delegate any of its civil enforcement powers related to railroad safety to the presiding officer. *Carpenter*, 432 F.3d at 1034. Moreover, FRA's locomotive engineer certification regulations serve to ensure railway safety, not to dictate a railroad's relationship with its labor force. *See, e.g., Carpenter*, 432 F.3d at 1034-35 (regulations were not designed to affect the relationships between railway companies and their labor force); *Qualifications for Locomotive Engineers*, Final Rule, 56 Fed. Reg. 28228, 28230 (June 19, 1991) (noting that, for example, FRA cannot order a railroad to alter its seniority rosters to accommodate a finding that a railroad wrongfully denied certification).

In short, the Hearing Officer's duty – and authority – is only to determine whether the thirty (30) day revocation of Hearing Petitioner's certification was correct. The Hearing Officer simply has no authority to order Herzog (or Veolia) to reverse the revocation, or to otherwise restore Hearing Petitioner's alleged "rights or benefits." *See, e.g., Carpenter*, 432 F.3d at 1033 (upholding FRA's assertion that the presiding officer's remedial powers did not embrace petitioner's requested relief of either ordering railroad to retrain and retest him, or simply certify him as a locomotive engineer). In other words, even if Hearing Petitioner's claims were correct, which Herzog disputes, Hearing Petitioner cannot obtain the requested relief and this proceeding should therefore be dismissed as moot.

B. Even If The Requested Relief Could Be Ordered, It Would Not Affect The Current Rights or Obligations Of The Parties

Furthermore, even if Hearing Petitioner's claims were correct *and* some form of relevant relief were permitted under the regulations and ordered by the Hearing Officer, such alleged relief would still not affect the current rights of the parties. Consequently, this proceeding is moot on that independent basis as well.

Following the thirty (30) day revocation Hearing Petitioner soon returned to work at Herzog as a certified locomotive engineer. Furthermore, Hearing Petitioner then transitioned from employment with Herzog to immediate employment with Veolia when Veolia took over the rail operations on the Tri-Rail commuter line. The prior revocation of Hearing Petitioner's certification clearly did not prevent him from either 1) remaining subsequently employed with Herzog as a certified locomotive engineer, or 2) obtaining subsequent employment with Veolia as a certified locomotive engineer directly following his employment with Herzog. More importantly, it is Herzog's understanding that Hearing Petitioner remains employed with Veolia to this day.

As previously noted, *supra* n.2, Hearing Petitioner instituted this proceeding shortly prior to voluntarily departing Herzog for employment with Veolia. This is not a situation in which the Hearing Petitioner is presently suspended by Herzog, had his certification permanently revoked by Herzog, or where the Hearing Petitioner was otherwise involuntarily terminated from his job with Herzog such that a favorable decision by the Hearing Officer might persuade the railroad to restore his certification and/or employment with Herzog. Consequently, any order directing a restoration of his "rights or benefits" or overturning the already-served revocation is moot because there are no current "rights or benefits" that need to be or could be restored to Hearing

Petitioner (and Herzog is in no position to do so in any event). Federal courts routinely dismiss employment-related lawsuits as moot if the plaintiff employee later voluntarily leaves employment with the defendant employer during the proceeding. *See, e.g., Arline v. Potter*, 404 F.Supp.2d 521, 529 (S.D.N.Y. 2005) (claim for relief related to employment practices was moot where plaintiff no longer worked for USPS due to voluntary retirement, did not seek reinstatement, and did not claim he would ever work for USPS again); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997); *Sherrer v. Lowe*, 125 F.3d 856, *1 (6th Cir. 1997) (where plaintiff was no longer employed by police department, controversy over who should conduct a hearing into whether he made false statements was over and case was moot) (unpublished decision).

Nor is Hearing Petitioner is exposed to any future or recurring sanction by Herzog as he is no longer employed with Herzog, and Herzog (or the FRA) has no power or authority to require Veolia to take any action with regard to the revocation. Herzog no longer operates the line and does not even control or operate the IRIS Interlocking at issue, which is within the purview of CSXT.[6] Nor would it be appropriate to continue the proceeding based solely on speculation as to what future events or actions may or may not occur with regard to Veolia or Hearing Petitioner's employment as, for the purposes of mootness, the controversy must be a "real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna*, 300 U.S. at 241 (emphasis added). Indeed, the dispute must be one that calls "for an adjudication of present right upon established facts." *Id.* at 242 (emphasis added); *see*

[6] Hearing Petitioner acknowledges as much. *See, e.g.*, Letter from Richard C. Beall, FRA-2007-28725-1 (June 27, 2007), at 6 ("CSX is solely responsible should anything go wrong with the tracks or signals.")

also GAF Building Materials Corp. v. Elk Corp., 90 F.3d 479 (Fed. Cir. 1996) (where complaint alleged dispute over possible future patent, dispute was purely hypothetical and called for impermissible advisory opinion, and court also could not have provided "specific relief through a decree of a conclusive character"). Emotional involvement alone is not enough to meet the case or controversy requirement. *Arline*, 404 F.Supp.2d at 529 (citations omitted). The established facts at present make clear that even if Hearing Petitioner somehow has an ongoing injury, such alleged injury is not redressable in this proceeding.

This is further demonstrated by the fact that an order by the Hearing Officer directing Hearing Petitioner's requested relief would simply have no effect on the current rights or obligations of the parties. *See Independence Party of Richmond County v. Graham*, 413 F.3d 252, 256 (2nd Cir. 2005) (when election has already taken place, decision would not have any effect on the rights or obligations of the parties); *Diaz v. Kinkela*, 253 F.3d 241, 243 (6th Cir. 2001) (released petitioner already served the challenged ninety day incarceration period under unconstitutional Ohio "bad acts" statute and, as a result, there was no injury for the court to afford a remedy, thus making petitioner's claim moot); *U.S. v. Rosenbaum-Alanis*, 483 F.3d 381, 383 n.6 (5th Cir. 2007) ("[t]he central question [in mootness cases] nonetheless is constant-whether decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have an impact on the parties.") (citing 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* § 3553 (2d ed. 1984)).

By the same token, even if Hearing Petitioner's requests for relief were *denied* and the revocation upheld as *correct*, Hearing Petitioner would still remain an employed and certified locomotive engineer with Veolia. In other words, as the Supreme Court stated in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), when a student was initially rejected from law school but later admitted pending appeals and would shortly receive a diploma regardless of the Court's decision on the merits, a "determination by this Court ... is no longer necessary to compel that result, and could not serve to prevent it." *Id.* at 316-17 (emphasis added).

In short, no order by the Hearing Officer on the present facts could now compel the further certification or employment of Hearing Petitioner, nor serve to prevent the retention of the locomotive engineer certificate and employment he currently holds. Consequently this proceeding should be dismissed as moot.

CONCLUSION

The Hearing Officer lacks the regulatory authority to provide Hearing Petitioner's requested relief. Moreover, even if the requested relief were somehow authorized and ordered by the Hearing Officer, the parties' current rights would remain unaffected. Herzog therefore respectfully requests that this proceeding be dismissed as moot.

Respectfully submitted,

Brendon P. Fowler
Counsel for Herzog Transit Services, Inc.

Dated: March 27, 2009

CERTIFICATE OF SERVICE
Docket No. FRA 2007-28725
(Formerly FRA No. EQAL 06-64)
Beall-Herzog

The undersigned hereby certifies that the foregoing Co-Respondent Herzog Transit Services, Inc.'s Motion to Dismiss for Mootness, and the accompanying Affidavit of Peter D. Kane, have been served on all parties named below in the manner indicated.

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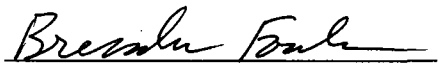

March 27, 2009
Date

EXHIBIT 1

U. S. DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION
WASHINGTON, D.C.

FRA - LOCOMOTIVE ENGINEER CERTIFICATION CASE
R. C. Beall, Hearing Petitioner, Docket No. FRA 2007-28725
(FRA Docket No. EQAL-06-64)

Herzog Transit Services, Inc., Co-Respondent

AFFIDAVIT OF PETER D. KANE

1. I am Director of Safety & Compliance for Co-Respondent Herzog Transit Services, Inc. ("Herzog"). I offer this affidavit in support of the accompanying Motion to Dismiss. This affidavit is based on my personal knowledge, as well as a review of certain public materials issued by the South Florida Regional Transportation Authority ("SFRTA") with respect to the current operations of its Tri-Rail commuter line by Veolia Transportation ("Veolia").

2. At the time of the incident at the "IRIS" Interlocking, Hearing Petitioner R. C. Beall ("Hearing Petitioner") was employed by Herzog as a certified engineer.

3. In response to the incident, Herzog immediately suspended and held Hearing Petitioner's certificate pending further investigation.

4. On September 27, 2006, a hearing was conducted on the incident, and Hearing Petitioner was informed by letter dated September 28, 2006 that he was responsible for violating certain CSXT operating rules and related violations.

5. As a result of the hearing and investigation, Hearing Petitioner's certificate was revoked for thirty (30) days. That revocation was retroactive to include the days he had already been held out of service, and ended on October 3, 2006.

6. Following the revocation period, Hearing Petitioner soon resumed normal duty with Herzog as a certified engineer.

7. At the time, Hearing Petitioner was operating on SFRTA's West Palm Beach-Miami Tri-Rail commuter line pursuant to Herzog's contract with SFRTA. Herzog did not seek to renew that contract when it was due to expire on July 1, 2007.

8. SFRTA selected Veolia to replace Herzog as of July 1, 2007, pursuant to a public Request for Proposal process which included the requirement that Veolia afford any relevant Herzog employees a priority in hiring at Veolia, subject to Veolia's independent hiring process. Herzog and Veolia are independent entities with no corporate relationship.

9. Veolia commenced operations on the Tri-Rail commuter line on July 1, 2007.

10. Hearing Petitioner was one of the legacy Herzog employees hired by Veolia, and consequently his last date of employment with Herzog was on June 30, 2007.

11. It is my understanding that Hearing Petitioner remains employed by Veolia. Hearing Petitioner has not worked for Herzog in any capacity since June 30, 2007, and Herzog has not had any other operations on the line.

Pursuant to 49 C.F.R. § 240.409(l) and 28 U.S.C. § 1746, I declare and certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Peter D. Kane
Herzog Transit Services, Inc.

March 26, 2009